Federal Court  Cour fédérale

Date: 20160620

Docket: T-1342-15

Citation: 2016 FC 679

Ottawa, Ontario, June 20, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

LOREN MURRAY PEARSON

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Loren Murray Pearson has brought an application for judicial review of an alleged decision by the Department of National Defence and Canadian Forces Legal Advisor [DND/CF Legal Advisor]. In a letter dated July 9, 2015, the DND/CF Legal Advisor declined to settle Mr. Pearson's claim for additional salary, pension and benefits pursuant to the Treasury Board's *Directive on Claims and Ex Gratia Payments* [the Directive].

[2] The Attorney General of Canada [Attorney General] denies that the letter from the DND/CF Legal Advisor is a "decision" that is amenable to judicial review. The Attorney General also argues that the proper legal recourse for Mr. Pearson is the grievance process.

[3] For the reasons that follow, I have concluded that the letter from the DND/CF Legal Advisor is not a "decision" that is amenable to judicial review. The application for judicial review is therefore dismissed.

II. Background

[4] On September 21, 2012, the Director, Military Careers Administration [DMCA] determined that Mr. Pearson should be released from the Canadian Armed Forces for sexual misconduct. The DMCA informed Mr. Pearson that he would be released no later than October 21, 2012, and that he would not be entitled to severance pay.

[5] On October 15, 2012, Mr. Pearson filed a grievance regarding his entitlement to severance pay.

[6] The DMCA subsequently amended Mr. Pearson's release date to October 25, 2012. Mr. Pearson was released and effectively ceased his military service on October 26, 2012. The Governor in Council approved his release on May 23, 2013, pursuant to article 15.01(3)(a) of the *Queen's Regulations and Orders for the Canadian Forces* [QR&O].

[7] Mr. Pearson's grievance regarding severance pay was referred to the Military Grievances External Review Committee [Committee], which recommended that the grievance be upheld and that redress be granted. In its "Findings and Recommendations", the Committee noted that only the Governor General has the authority to approve the grievor's release, and the DMCA could therefore initiate the process but could not approve it:

> In accordance with sub-paragraph 15.01(3)(a) of the QR&O, the authority to approve the grievor's release is the Governor General because the grievor is an officer other than an officer cadet. There is no provision in Chapter 15 of the QR&O for the Governor General to delegate this authority […]
>
> Therefore, I must conclude that the DMCA direction provided on 21 September 2012 to the effect that "[the grievor] is to be released under QR&O 15.01, item 5(f) – Unsuitable for further service" is actually initiating the release process rather than approving the release. Further, the evidence confirms that the Governor General approved the grievor's release on 23 May 2013.

[8] The Committee's Findings and Recommendations also contained the following "Observation":

> While it is not an issue raised by the grievor, I feel compelled to observe that the current administrative release process does not seem to take into account that the releasing authority, under the regulations, is the Governor General, not the DMCA. Legally, this would mean that the release message issued by the DMCA is, at most, a recommendation to release. Also, while QR&O 15.03(2) allows the approving authority to set a date for release, it is of concern to me that officers, such as the grievor, are being released before the approving authority, the Governor General, has approved their release. […]

[9] On October 24, 2014, the Chief of the Defence Staff, in his capacity as the Final Authority in the grievance process, accepted Mr. Pearson's grievance and recognized his entitlement to severance pay.

[10] On January 27, 2015, Mr. Pearson sent a letter to the DND/CF Legal Advisor claiming additional salary, pension and benefits. Based on the analysis found in the Committee's Findings and Recommendations, he claimed that his pay should not have ceased on the day he was released from the Canadian Armed Forces (October 26, 2012), but rather on the day his release was approved by the Governor General (May 23, 2013). Mr. Pearson claimed an additional seven months of salary, an increase in his pension and retirement benefits, together with interest and legal costs. He based his claim on article 15.03(2)(a) of the QR&O, which provides that the date of an officer's release from the Canadian Armed Forces shall be set by the approving authority.

[11] On July 9, 2015, the DND/CF Legal Advisor sent a letter to Mr. Pearson which stated, in part:

> I have read the documentation that you provided us and additional documents that I gathered pertaining [to] this matter and I conclude that there is no liability on the part of the Crown and no compensation can therefore be granted.

[12] The DND/CF Legal Advisor noted that under s 208.31 of the QR&O, a member of the Canadian Armed Forces who does not provide military service "may have his pay ceased". She asserted that Mr. Pearson ceased his military service on October 26, 2012, the date of his release, and that this was not modified by the date on which the Governor General approved his release.

[13] The letter from the DND/CF Legal Advisor was marked "without prejudice", and specifically reserved the right of Her Majesty the Queen to raise any defence to Mr. Pearson's claim that may be available in law, including any applicable limitation period.

[14] On August 13, 2015, Mr. Pearson applied for judicial review of the letter from the DND/CF Legal Advisor dated July 9, 2015.

[15] On October 14, 2015, the Attorney General brought a motion under Rule 221 of the *Federal Courts Rules*, SOR/98-106 to strike Mr. Pearson's application for judicial review. The motion was refused by Justice Martine St-Louis on the ground that Mr. Pearson's application was not so clearly improper as to be bereft of any chance of success (*Loren Murray Pearson v Canada (Attorney General)*, 2015 FC 1286 [*Pearson*]).

III. Issue

[16] The sole issue raised by this application for judicial review is whether the letter from the DND/CF Legal Advisor dated July 9, 2015 is a "decision" that is amenable to judicial review pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [the Act].

IV. Analysis

[17] The Attorney General argues that this Court lacks jurisdiction to determine Mr. Pearson's application for judicial review because the alleged decision was not made by a "federal board, commission or other tribunal". Nor was it a "final decision" that is amenable to judicial review.

A. *Federal Board, Commission or Other Tribunal*

[18] Section 18.1 of the Act provides that an application for judicial review may be made in respect of a decision or order of a federal board, commission or other tribunal. Section 2 of the Act provides that a "federal board, commission or other tribunal" means "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament".

[19] The DND/CF Legal Advisor is an office of the Department of National Defence which provides objective legal advice to the Department of National Defence and Canadian Armed Forces (*Pearson* at para 3). Whether the DND/CF Legal Advisor was acting as a "federal board, commission or other tribunal" depends upon: (a) the source of the power exercised by the DND/CF Legal Advisor; and (b) the nature of that power (*Innu Nation v Pokue,* 2014 FCA 271 at para 11 [*Innu Nation*]).

[20] In *Pearson* at paragraphs 37-38, Justice St-Louis found that the source of the DND/CF Legal Advisor's power was the Directive. Similarly, in *Sandiford v Canada (Attorney General),* 2009 FC 862 at paragraph 10 [*Sandiford*], Justice Kelen held that the authority to settle claims for compensation on behalf of the Department of National Defence arises from the *Treasury Board Policy on Claims and Ex Gratia Payments*, the predecessor to the Directive.

[21] The Attorney General disagrees that the Directive is the source of the DND/CF Legal Advisor's authority to settle or refuse claims. The Attorney General argues that the DND/CF

Legal Advisor's relationship with the Department of National Defence and Canadian Armed Forces is that of solicitor and client. The sole authority that is being exercised is therefore s 5 of the *Department of Justice Act*, RSC, 1985, c J-2 [DOJ Act], which provides that the Attorney General is charged with the regulation and conduct of all litigation for or against the Crown or any department.

[22] The Attorney General's position is that the letter of July 9, 2015 is a "without prejudice" communication of the Crown's legal position regarding its potential liability to Mr. Pearson. Viewed in this light, the DND/CF Legal Advisor is not exercising a public law power conferred by statute, but rather is negotiating a possible settlement of a civil claim in her capacity as solicitor for the Crown. The Attorney General characterizes this function as private in nature (citing *Air Canada v Toronto Port Authority*, 2011 FCA 347 at para 52 [*Air Canada*]).

[23] In my view, the source of the DND/CF Legal Advisor's power to settle or refuse claims is found in the DOJ Act and also the Directive, which is issued under the authority of s 7 of the *Financial Administration Act*, RSC 1985, c F-11. In either case, the source of the DND/CF Legal Advisor's authority originates in a federal statute.

[24] When the DND/CF Legal Advisor rejected Mr. Pearson's claim ("I conclude that there is no liability on the part of the Crown and no compensation can therefore be granted"), her choice of words implied that she was exercising, or purporting to exercise, powers conferred under an Act of Parliament. There was nothing to suggest that the DND/CF Legal Advisor was acting on instructions or conveying her client's position in her role as a lawyer. Instead, she presented

herself as the *de facto* decision-maker. In this respect, one could reasonably infer that the DND/CF Legal Advisor was acting as a "federal board, commission or other tribunal" within the meaning of the Act.

[25] However, the matter is not free from doubt. The Court was not provided with the full record supporting the position of the DND/CF Legal Advisor that there was no liability on the part of the Crown and that no compensation could therefore be granted. In these circumstances, I am not prepared to dismiss Mr. Pearson's application solely on the ground that the DND/CF Legal Advisor was not acting as a "federal board, commission or other tribunal".

B. *"Final" Decision*

[26] The Attorney General's position is that the Directive does not grant Mr. Pearson any right to receive a settlement offer. The Attorney General says that the Directive serves an "administrative purpose". It does not have the force of law, nor does it grant any right to any individual.

[27] Justice Tremblay-Lamer of this Court held that the predecessor to the current Directive was a policy that did not have the force of law (*Byer v Canada*, 2002 FCT 518 at para 3, [2002] FCJ No 672, aff'd 2002 FCA 430, leave to appeal to SCC refused). Citing this Court's decision in *Girard v Canada (Minister of Agriculture)* (1994), 79 FTR 219, [1994] FCJ No 420, she held that the courts should not intervene to enforce a rule that is administrative in nature.

[28] In *Sandiford*, a case that bears some resemblance to the present one, Justice Kelen remarked at paragraph 29 that the Directive does not have the force of law:

> In *obiter*, I find that the authority of the Director of Claims and Civil Litigation to settle claims for compensation on behalf of the Department of National Defence arises out of a policy which does not have the force of law. It is a policy intended to avoid unnecessary legal action. But, if it is decided not to negotiate a settlement for compensation, that decision is not a final decision affecting the rights of the applicant. Rather, the applicant is entitled to pursue his other legal remedies which may include commencing an action in a court of competent jurisdiction.

[29] Mr. Pearson argues that the letter he received from the DND/CF Legal Advisor is a final decision as it represents the exhaustion of the internal administrative remedies available to him. He characterizes the letter as a "binding decision" made by the only entity authorized to grant him compensation for lost salary and benefits. He submits that his ability to commence an action in this matter is immaterial to this application for judicial review.

[30] In *Air Canada*, Justice Stratas observed that there are many situations where, by its nature or substance, an administrative body's conduct does not trigger the right to seek judicial review: "[o]ne such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects" (*Air Canada* at paras 28-29).

[31] Similarly, in *Democracy Watch v Canada (Conflict of Interest & Ethics Commissioner)*, 2009 FCA 15, the Federal Court of Appeal held at paragraph 10 that a non-binding letter from the Conflict of Interest and Ethics Commissioner was not reviewable because it was neither a

decision nor an order: "[w]here administrative action does not affect an Applicant's rights or carry legal consequences, it is not amenable to judicial review".

[32] In this case, the refusal of the DND/CF Legal Advisor to settle Mr. Pearson's claim had no prejudicial effect on his legal rights. Mr. Pearson does not have a statutory right to the settlement of his claim, and the DND/CF Legal Advisor is not statutorily obliged to make a settlement offer. A statement of the DND/CF Legal Advisor's legal position has no legal impact on Mr. Pearson's right to file a grievance or bring an action against the Crown, nor does it end the possibility of informal settlement of the dispute in the future.

[33] I am therefore of the view that the letter from the DND/CF Legal Advisor dated July 9, 2015 is not a "decision" that is amenable to judicial review.

[34] In light of this conclusion, it is unnecessary to consider the Attorney General's position that the proper legal recourse for Mr. Pearson is the grievance process. Mr. Pearson may seek redress either by means of a grievance or, if this process is not available to him, by means of a civil action. He may also continue to pursue informal settlement of his claim.

V. Conclusion

[35] The application for judicial review is dismissed. The Attorney General has requested costs, but did not submit a draft bill of costs or address the matter at the hearing as contemplated by this Court's Notice to the Parties and Profession dated April 30, 2010. I therefore exercise my discretion to award costs in the fixed amount of $1,000.00, inclusive of disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs in the fixed amount of $1,000.00, inclusive of disbursements.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1342-15
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